

Appl. No 09/834,833
AMENDMENT DATED February 1, 2007

REMARKS/ARGUMENTS

This is in response to an Office Action dated November 1, 2006. Note that the above-identified Office Action did not contain an initialed copy of a PTOL-1449 form which was submitted on October 9, 2006. Accordingly, the Examiner is requested to review the cited document and confirm its' consideration in the next Office Action.

Note that the above-identified Office Action also did not contain a PTOL-413, although it is traditionally sent after an Examiner Interview. The Examiner was previously requested to send this form. See the Amendment filed in September 6, 2006. But there has been no response in the above-identified Office Action. Hence, the Examiner is once again requested to send the same, with the next Office Action.

Claims 46 and 47 were indicated as being allowed in paragraph 7 on page 9 of the above-identified Office Action. Accordingly, none of the following remarks are applicable to these claims.

Claim 11 was indicated as being allowable if rewritten in independent form, in paragraph 6 on page 9 above-identified Office Action. Accordingly, this claim has been re-written and is believed to be in form for allowance. Claims 12-18 are amended to depend either directly or indirectly from Claim 11 and hence these claims are believed to be in form for allowance for at least the same reasons as the base claim from which they depend, i.e. Claim 11. Additionally, Claim 32 is now amended to recite limitations similar to those recited in Claim 11. The Examiner is requested to carefully review this claim and confirm its patentability, for reasons similar to the reasons for patentability of Claim 11.

Claim 29 was rejected as being directed to non-statutory subject matter under 35 USC §101. The Examiner stated the following reason for rejection, at the top of page 4 of the above-identified Office Action:

Claim 29 is non-statutory. Because claims 1-2 include, "An apparatus", and "means for....", which does not include *physical structure of the machine in terms of its hardware or hardware and software combination*. Therefore, claim 29 is software per se. Thus, the claim 29 is not a statutory and should be rejected under 35 U.S.C. § 101 as not being tangible.

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Applicant respectfully traverses this remark. Specifically, Claims 1-2 do not include "An apparatus" and "means for ..." as stated by the Examiner. This is a prima facie defect in the rejection.

Moreover, Claim 29 is now directed to a "computer" and further more it now requires a "processor". Hence, the Applicant now respectfully requests the Examiner to withdraw the §101 rejection of Claim 29.

Claim 1 was rejected as being anticipated by US Patent 6,366,987 granted to Tzelnic. Applicant respectfully traverses this rejection for several reasons as follows.

Firstly, the Examiner stated that the first and second limitations in Claim 1 are found in box 151 in fig. 10 and in column 18, lines 13-65 and in column 6 lines 28-44. See bottom of page 4 of the above-identified Office Action. However, Tzelnic fails to disclose or suggest "conditionally copying" and "alternatively creating" as recited in the 2nd limitation of Claim 1. Instead, Tzelnic at most teaches initiating a copying process in response to the backup command, and Tzelnic's copying process appears to directly perform the copying. There appears to be nothing which is being done "conditionally" and "alternatively" as per Claim 1, in the Examiner-cited text from Tzelnic's patent.

Secondly, the Examiner stated that the third and fourth limitations in Claim 1 are found in column 6, lines 28-44 which are reproduced below for ready reference:

In response to a backup command from the host 20, the primary data storage subsystem 21 accesses a primary directory 26 to find data of the physical storage unit specified by the backup command in order to initiate a process of copying the data from the primary storage 27 to the secondary storage 29 of the secondary data storage subsystem 22. Preferably, the primary directory 26 is constructed in such a way that the host can continue to access the primary storage 27 concurrently with the copying process. For example, in response to the backup command from the host 20, the primary data storage subsystem creates an "instant snapshot copy" of the specified physical storage unit, and this instant snapshot copy is protected from modification by the host 20 while the instant snapshot copy is being written to the secondary storage 29. There are a number of ways that such an instant snapshot copy can be created, depending on the way that the primary directory is organized.

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The above-quoted text from Tzelnic fails to disclose or suggest that host 20, after it issues the backup command (to initiate the copying process), repeats the earlier steps with another item. Tzelnic at most states that host 20 may access primary storage 27 concurrently with the copying process, but does not further describe what happens during the access. In contrast, Claim 1 requires the parent process to perform the checking, the conditionally copying and alternatively creating, with a second item.

Moreover, nothing in the above-quoted text from Tzelnic's discloses or suggests that the copying process, after it is created, repeats the earlier steps with another item (in either primary directory 26 or secondary directory 28. In contrast, Claim 1 requires that after creation, the child process performs the checking, the conditionally copying and the alternatively creating, with another item in the directory represented by the first item.

For one or more of the above-discussed reasons, Applicant respectfully submits that one or more limitations in Claim 1 are nowhere disclosed or suggested by Tzelnic. Hence, Applicant respectfully requests the Examiner to withdraw the anticipation rejection of Claim 1. Claims 4-10, 19, 34, 36, 38 and 39 depend from Claim 1 and are therefore patentable for at least the same reason(s) as Claim 1.

In the above-identified Office Action, the Examiner rejected the remaining claims on the basis of statements which are replete with errors. Hence, all of the Examiner's statements in the above-identified Office Action are hereby traversed, for being incorrect. The following remarks are illustrative of some failures of the Examiner's remarks to make a *prima facie* case of anticipation.

For example, the Examiner stated in the middle of page 5 of the above-identified Office Action that Tzelnic teaches in column 1, lines 11-55 as follows: comparing a current number of process, created for copying, with a limited, and waiting if the current number is greater than or equal to the limit. This remark is traversed because Tzelnic fails to disclose or suggest "a current number of processes." Tzelnic also fails to disclose or suggest "created for copying." Tzelnic further fails to disclose or suggest "waiting". All these remarks are not supported in the cited text from Tzelnic. As none of the corresponding limitations of Claim 4 are disclosed or suggested by Tzelnic, Claim 4 is believed to be not anticipated. Hence, these are additional reasons for the patentability of Claim 4.

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As another example, the Examiner stated in page 5 of the Office Action that the same text from Tzelnic discloses certain limitations in Claim 5. Again, this rejection is traversed because Tzelnic fails to disclose or suggest "increasing a limit on a resource". Tzelnic also fails to disclose or suggest "the child process using the resource at the increased limit. As neither of these two limitations of Claim 5 are disclosed or suggested by Tzelnic, these are additional reasons for the patentability of Claim 5.

Moreover, Tzelnic does not disclose "number of open files" or "file size" or "memory" as being the resource in column 2, lines 18-67.

Additionally, contrary to the Examiner statement at the bottom of page 5 of the above-identified Office Action, Tzelnic does not disclose a stack or heap in column 9 lines 60-67 to column 10 lines 1-45. The cited text from Tzelnic describes his cache memory 52 and his data storage subsystem 41. There is no reference to a stack or a heap. In fact a key word search of this Tzelnic's patent could not find these two words anywhere in the whole patent. Clearly the Examiner's statements are without basis and fail to provide a prima facie basis for anticipation rejection of Claims 9-10.

Furthermore, Tzelnic does not disclose checking if an item is a link to itself in his column 9 lines 60-67 to column 10 lines 1-45. As noted above, the cited text from Tzelnic describes his cache memory 52 and his data storage subsystem 41. There is no reference to a link to itself. Hence, the Examiner has failed to provide a prima facie basis for anticipation rejection of Claim 12.

Additionally, contrary to the Examiner's statement with respect to Claim 14, in the middle of page 6 of the office action, the word "email" could not be found anywhere in the whole patent by Tzelnic. Again, this shows that the Examiner's statements are without any basis whatsoever. Hence, the Examiner has again failed to provide a prima facie basis for anticipation rejection of Claim 14.

Furthermore, contrary to the Examiner's statement with respect to Claim 36, in the middle of page 8 of the office action, nothing in column 9 lines 60-67 to column 10 lines 1-45 discloses or suggests "number of directories". Instead, only a single directory 26 is disclosed by Tzelnic as the primary directory to be copied to the secondary directory. Once more, this shows that the Examiner's statements are without any basis whatsoever.

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Hence, the Examiner has again failed to provide a **prima facie basis** for anticipation rejection of Claim 36.

Also, note that Tzelnic does not disclose checking if a file is in a list of items to be excluded, contrary to the Examiner's statement with respect to Claim 38 on page 8 of the Office Action. Tzelnic is silent as to what his copying process does with a file to be copied, in the Examiner-cited description at column 9 lines 60-67 to column 10 lines 1-45. As noted above, the cited text from Tzelnic describes his cache memory 52 and his data storage subsystem 41. For the same reason, the Examiner's statement with respect to Claim 39 is also incorrect. Hence, the Examiner has failed to provide a **prima facie basis** for anticipation rejection of Claims 38 and 39.

While the above remarks are not an exhaustive list of the errors in the Office Action, they are sufficient to establish the Examiner's failure to provide a **prima facie basis** for the rejection of Applicant's claims. As noted above, all of the Examiner's statements in the above-identified Office Action are traversed, for being incorrect.

In view of the above remarks, Applicant submits that all pending claims are in form for allowance and allowance thereof is respectfully requested. Should there be any questions concerning this paper, please call the undersigned at (408) 982-8203.

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that this correspondence is being facsimile transmitted to the U.S. Patent and Trademark Office to the fax number 571-273-8300 on February 1, 2007.

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Respectfully submitted,

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